United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-2064

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES ex rel. ROBERTO S. DELGADO,

Petitioner-Appellant,

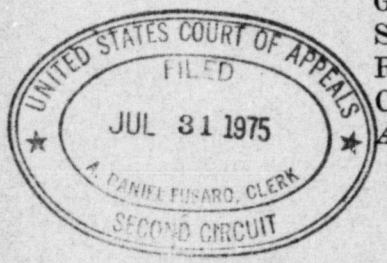
v.

CARL ROBINSON, Warden of Connecticut Correctional Institution at Somers,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RESPONDENT-APPELLEE'S BRIEF



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Issues Presented on Appeal

The issues are fully stated on page one of the appellant's brief, and that statement is accepted and adopted by the appellee.

Statement of the Case

Procedural Facts: The petitioner was convicted of murder in the Superior Court for Hartford County in 1967 and sentenced to death. That judgment was affirmed by the Supreme Court of Connecticut on November 23, 1971. *State* v. *Delgado,* 161 Conn. 536, 290 A.2d 338. On writ of certiorari to the United States Supreme Court, the matter was reversed on the issue of the death penalty only

and remanded for imposition of a constitutionally sanctioned punishment. *State* v. *Delgado,* 408 U.S. 940, 92 S. Ct. 2879, 33 L. Ed.2d 764. On January 23, 1973, the petitioner was resentenced in the Superior Court for Hartford County to life imprisonment. He did not appeal from that judgment to the Supreme Court of Connecticut. The instant action for habeas corpus relief was filed in the District Court in April of 1973, and the petitioner now appeals the decision of that court, rendered by Judge Robert Zampano, denying him relief.

Substantive Facts: The factual basis for this conviction has never been in dispute and is reported in some detail at *State* v. *Delgado,* 161 Conn. 536, 541-543, 290 A.2d 338, 340-341. The essential facts can be summarized as follows:

On August 25, 1967, the petitioner Roberto Delgado returned to his Hartford home from work around noontime. He drank some whisky and beer. Later on, he was driven to Charter Oak Terrace in Hartford, to 184 Newfield Avenue. He went to the home of Elena Dieppa who was a friend of his. When he came to the door, Mrs. Dieppa asked one of her sons to call the police, and she left the house. (Ex. 4, Rec. p. 5)[1]

Police Officer Harvey Young was dispatched to Newfield Avenue. He went to the front door of the Dieppa home, and Delgado went out the back door. The officer called to Delgado who came and sat in the police cruiser with the officer. A young son of Mrs. Dieppa was standing near the police cruiser and told Officer Young that the person in the cruiser with him was named Roberto Delgado. The boy also told Officer Young that there was a warrant out for Delgado. (Ex. 4, Rec. p. 6)

Officer Young called the Hartford Police Department on his radio to inquire about an outstanding warrant for Delgado. He was told by the dispatcher, after the dis-

[1] Exhibit 4 is printed at pages 14a-24a of Petitioner's Appendix.

patcher checked, that there was a warrant outstanding for Roberto Delgado for breach of peace. Officer Young then placed Delgado under arrest. The young boy standing near the cruiser also told Delgado in Spanish that the policeman said he was under arrest. (Ex. 4, Rec. pp. 6-7)

Officer Young started to drive to the Hartford Police Department and stopped on Overlook Terrace. Officer Young and Delgado were struggling in the cruiser and the struggle continued outside the cruiser and into the street. (Ex. 4, Rec. p. 8) (See Petitioner's Appendix, pages 20a-21a)

As the struggle continued the officer used a blackjack on Delgado, and Delgado had the officer's nightstick and was swinging at the officer and hitting him. The officer was trying to get Delgado back into the cruiser. As they struggled into the street, they wrestled each other to the ground. The officer fell on his back with Delgado on top of him in the middle of the street. (Ex. 4, Rec. p. 8) The officer seemed to be in a hopeless position and called for help. He tried to draw his gun and both men struggled for the gun. In the struggle one shot was fired hitting Delgado in the chest. Delgado then struck the officer several times on the head with the nightstick and took the gun from the officer. The officer rolled over onto his stomach, crawled from his position in the middle of the street to the curb of the street and collapsed. He was lying still, face down with his head on a grass plot and his feet over the curb into the street. (Ex. 4, Rec. p. 8)

Delgado stood at the officer's feet, bent forward and fired at the officer's head. He shot the officer in the back and head four times. He continued to fire the gun until it clicked and would not fire any more. (Ex. 4, Rec. p. 9) Delgado then ran away, first trying to drive the police car, and then running behind some of the buildings in the neighborhood. He ran into an apartment by breaking the glass in the locked rear door. A woman with two small children was in the apartment. The woman jumped out a

window and called for help. Delgado went to a second-floor bedroom and was found there sitting on the floor holding the two small children. The children were not hurt although the police had to break into a locked bedroom to take Delgado into custody. (Ex. 4, Rec. p. 10)

Officer Young died from gunshot wounds in the head and back. Gunpowder fragments and powder residue were found on the back of the policeman's shirt. The gun fired by Delgado was not more than one foot from the officer's body when it was fired. (Ex. 4, Rec. pp. 12-15)

The warrant for Delgado's arrest was held in the Detective Division in the "active warrants" file. The warrant was actually served on Delgado and executed on September 8, 1967, after he was released from Hartford Hospital (Ex. 4, Rec. pp. 15-16)

ARGUMENT

1. The Absence of Counsel Before the Grand Jury Did Not Violate the Petitioner's Constitutional Rights.

Indicting grand juries in Connecticut follow the general pattern of ex parte procedure generally known to this historical method of factual investigation. *State* v. *Stallings,* 154 Conn. 272, 280, 224 A.2d 718, 723 (1966). By contrast with the federal system, however, the state is not represented by counsel during the proceedings before the grand jury.[1] *State* v. *Menillo,* 159 Conn. 264, 274, 268 A.2d 667, 672 (1970). And as a second point of contrast, an accused party, if he is in custody or his whereabouts are known, is generally afforded the opportunity of being present during the testimony before the grand jury. *State* v. *Menillo, supra.* As pointed out in the *Menillo* case, Connecticut

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[1] It is difficult to imagine a critical stage of the "prosecution" when no representative of the state is present.

law does not require his presence or deem it a matter of right.

The petitioner has cited *State* v. *Kemp,* 126 Conn. 60, 9 A.2d 63 (1939) for the proposition that only admissible evidence may come before a grand jury, thus implying some rationale purpose to the proposed presence of defense counsel at grand jury proceedings. That dictum in *Kemp* was examined and essentially abandoned in *State* v. *Stallings, supra,* 280-281. The Connecticut court in *Stallings* quotes a passage from *Wigmore* to the effect that, on all principles, jury trial rules of evidence should not apply to grand jury proceedings. *State* v. *Stallings, supra,* 280. "The court did not err in refusing to quash or dismiss the indictment even if it is assumed that evidence not legally admissible on a trial was heard and considered. . . . The defendant is fully protected against the reception of inadmissible evidence of his guilt in his trial before the petit jury." *State* v. *Stallings, supra,* 281; see *State* v. *Menillo, supra,* 274.

Connecticut practice in this regard is consistent with federal constitutional standards. In *United States* v. *Calandra,* 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed.2d 561, the United States Supreme Court recently addressed itself to examining the function of grand juries and concluded that the general protections afforded during adversary proceedings are inapplicable to grand jury investigations. Both inadmissible and incompetent evidence may be received by a grand jury, which "is not an adversary hearing", and which is not bound by the exclusionary rule. *United States* v. *Calandra, supra.* The reasoning of *Calandra* follows logically from *United States* v. *Dionisio,* 410U.S. 1, 17, 35 L. Ed.2d 67, 81, 93 S. Ct. 764, holding that "minitrials" on claims of law before a grand jury would be inconsistent with that body's function as an investigative arm of the judicial system. The foregoing principles of Connecticut procedure and federal law demonstrate that

the presence of counsel before the grand jury which indicted the petitioner was mandated neither by constitutional language nor by reason and logic.

Federal cases dealing with the specific question have held that there is no right to counsel before a grand jury. See *In re Groban,* 352 U.S. 330, 333, 1 L. Ed.2d 376, 77 S. Ct. 510 (1957); *United States* v. *Scully,* 225 F.2d 113, 116 (2nd Cir., 1955); *United States* v. *George,* 444 F.2d 310, 314-315 (6th Cir., 1971); *Gollaher* v. *United States,* 419 F.2d 520, 523-524 (9th Cir., 1969), cert. den. 90 S. Ct. 434; *Hammond* v. *Brown,* 323 F. Supp. 326, 338 (D.C., Ohio, 1971). The rule has also been recently reaffirmed by the Connecticut Supreme Court. *State* v. *Cobbs,* 164 Conn. 402, 411-412, 324 A.2d 234 (1973).

Under Connecticut procedure, an accused may neither testify nor present evidence before the grand jury. *State* v. *Menillo, supra,* 274. He has the opportunity to be present during the testimony taken by the grand jury, which presence he may waive, and he may at his option ask questions of the witnesses. *State* v. *Stallings, supra,* 282; *State* v. *Menillo, supra,* 272. Since the accused could be constitutionally excluded altogether from the grand jury proceedings, it would make no constitutional sense to hold that admitting him without counsel, and under the non-incriminating procedure described above, was violative of his rights.

II. There Is No Constitutional Requirement To Preserve Testimony Before a Grand Jury.

The Connecticut rule, here challenged by petitioner, is that grand jury proceedings are not transcribed. *State* v. *Cobbs,* 164 Conn. 402, 411, 324 A.2d 234, 241 (1973); *State* v. *Delgado,* 161 Conn. 536, 539-540, 290 A.2d 338, 340 (1971). This rule is adjunctive to the secret and ex parte

nature of its investigation. See *State* v. *Menillo,* 159 Conn. 264, 278, 268 A.2d 667, 674 (1970).

Federal law does not require the abrogation of the Connecticut rule in this regard. *United States* v. *Cramer,* 447 F.2d 210, 213-214 (2nd Cir., 1971), cert. den. 404 U.S. 1024; *United States* v. *Caruso,* 358 F.2d 184, 186 (2nd Cir., 1966) cert. den. 385 U.S. 862; *United States* v. *Cianchetti,* 315 F.2d 584, 591 (2nd Cir., 1963); *United States* v. *Harflinger,* 436 F.2d 928, 935-936 (8th Cir., 1970); *Loux* v. *United States,* 389 F.2d 911, 916 (9th Cir., 1968). The cases from various federal jurisdictions, including this circuit, appear to hold uniformly that nonrecordation of grand jury testimony is constitutionally permissible, and this principle is reinforced by the view taken of the grand jury function in *United States* v. *Calandra,* 414 U.S. 338, as discussed in part I of this brief.

III. The Arrest of the Defendant Was Not Illegal and Could Not In Any Event Justify Deadly Force Against Officer Young.

The undisputed facts in this case reveal that Officer Young was disarmed and in a helpless position at the time the petitioner shot him in the head with four bullets from the officer's service revolver. That homicidal act, inflicted on a man who had retreated and collapsed on his stomach in a prone position, could not be legally justified in the resistance to any arrest, lawful or unlawful. It would make as much sense to try and justify the killing of a desk sergeant by a wrongfully arrested citizen than it does to defend the petitioner's shooting of Officer Young. The petitioner's own wounds, and his mental state, should not be confused with the issue of the arrest's legality and the claim of justified resistance.

The original arrest, nonetheless, was proper and lawful. The defendant has never denied that he was in fact the

subject of an outstanding misdemeanor warrant, and that warrant was in fact executed subsequent to the events in question. Officer Young of course had confirmed the existence of the warrant by radio before taking Delgado into custody.

The factual and legal issues are discussed at length in *State* v. *Delgado,* 161 Conn. at 543-546, 290 A.2d at 342-343. The Connecticut court determined that the arrest was legal and that finding should be conclusive as a matter of state law. That holding is certainly not inconsistent with any federally mandated principle of constitutional law. See *Whiteley* v. *Warden,* 401 U.S. 560, 568, 91 S. Ct. 1031, 28 L. Ed.2d 306 (1971). The language in *Whiteley* approving the arresting officer's reliance on the radio bulletin is not diminished by the fact that the warrant in that case was ultimately held defective.

The petitioner was tried and convicted on a charge of murder, not breach of peace. The legality of the arrest for the latter charge is immaterial under the facts of this case. Even assuming an illegal arrest for breach of peace, giving Delgado "the right to attempt to regain his liberty", as he claims on page 29 of his brief, he had in fact clearly regained that liberty prior to shooting and killing Officer Young. The arrest was merely a factual *sine qua non* to the murder, but no more. Since the legality of the arrest on the murder charge is not in dispute, and the legality of the arrest on the breach of peace charge is not relevant, the petitioner's claim cannot survive close examination.

IV. The Doctrine of Abatement and Pardon Does Not Preclude the Petitioner's Prosecution for Murder.

The petitioner was prosecuted under the provisions of Connecticut General Statutes section 53-10 for a homicide which occurred on August 25, 1967. The Connecticut Penal Code, adopted as Public Act 69-828, became effective

on October 1, 1971, and was codified as Title 53a of the General Statutes. The Penal Code included a provision repealing scores of criminal statutes, including section 53-10, which were replaced by its substantive provisions. Public Act 69-828, section 214. Under the provisions of section 2 of the Code, codified as section 53a-2, the entire Code, *including the repealer,* apply only to offenses "committed on after October 1, 1971". Thus not only the new murder statute, section 53a-54, but also the section repealing 53-10 are inapplicable to the offense in this case.

In addition to the nonapplicability of the repealing statute to this case, as discussed in the preceding paragraph, there are two savings statutes which would otherwise preserve the prosecution of this petitioner. His attempts to escape the public policy of sections 1-1 and 54-194 of the Connecticut General Statutes are not sound. See also section 53a-4. The implication of his argument is that a person committing murder on September 30, 1971, the day prior to the effective adoption of the Penal Code, could never be prosecuted. Such a result would distort legislative intent and ignore the malum per se character of unlawful homicide.

In *State* v. *Pastet,* an Opinion released by the Connecticut Supreme Court on June 24, 1975, it has been held that the applicability of section 53-10 to homicides prior to October 1, 1971, survived after the adoption of the Penal Code. *State* v. *Pastet,* 36 Connecticut Law Journal, No. 52, pp. 10, 13. The *Pastet* case controls the present claim of the petitioner as a matter of definitive state law.

It should furthermore be recognized, as it has been by the court below, that the simultaneous reenactment of a criminal statute with the repeal of its substantive predecessor is basically inconsistent with the doctrine of abatement and pardon.

Conclusion

The petitioner was convicted in December of 1967 for a murder which occurred in August of that year. This action seeks to review various legal claims arising out of that conviction. For the reasons stated above, it is respectfully submitted that the judgment of the District Court denying relief be affirmed.

Respectfully submitted,

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Attorneys for Appellee

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
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UNITED STATES ex rel. ROBERTO S. DELGADO,

Petitioner-Appellant,

against

CARL ROBINSON, Warden of Connecticut Correctional Institution at Somers,

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 31st day of July, 1975, he served two copies of the Respondent-Appellee's Brief on Emanuel Margolis, Esq.

the attorney for the Petitioner-Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 777 Summer Street, Stamford, Conn. (xxx)xxxx., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
31st day of July, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976